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In the Supreme Court
OF THE
United States

October Term, 1976

No. 76-507

Marguerite Leipzig, Mayor of The City of Redwood City, California, and Charles Gyselbrecht, Building Official of The City of Redwood City, California,
Petitioners,

vs.

Alan L. Baldwin and George Q. Cannon, Jr.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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MARGUERITE LEIPZIG, MAYOR OF THE CITY OF REDWOOD CITY, CALIFORNIA, and CHARLES GYSELBRECHT, BUILDING OFFICIAL OF THE CITY OF REDWOOD CITY, CALIFORNIA,
Petitioners,

vs.

ALAN L. BALDWIN and GEORGE Q. CANNON, JR.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Alan L. Baldwin and George Q. Cannon, Jr., respond to the Petition for a Writ of Certiorari filed herein and request that the Court decline to review the judgment of the United States Court of Appeals for the Ninth Circuit entered August 9, 1976.

QUESTION PRESENTED

Whether enforcement of certain provisions of the Redwood City Code which impose burdensome and unnecessary restrictions on the use of temporary political signs during public elections violates the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Plaintiffs, residents of and owners of property in Redwood City, California, filed this action in March 1974, seeking summary and permanent injunctive relief against the enforcement of certain provisions of the Redwood City Code relating to the size, number and placement of political signs within the city, and a declaration that said provisions are violative of the First and Fourteenth Amendments to the United States. The procedural background of the case and the substance of the rulings below are set forth at pages 4 and 5 of the Petition.

a. Provisions of the Code Challenged by Plaintiffs

The provisions challenged in the complaint are as follows:

Section 3.136 requires that for *each* temporary sign or poster sought to be erected the applicant must pay a non-refundable "inspection fee" of $1.00, tender a $5.00 cash deposit or corporate surety bond which is subject to forfeiture in the event the sign is removed for violation of any of the provisions of the code, and secure a permit for the sign by executing an application form provided by the city.

The application on its face requires the applicant to provide the following information: The name, address and telephone number of the owner of the sign; the name, address and telephone number of the sign erector; the address, lot, block and subdivision of the sign location; a description of the type of sign to be erected (e.g., free standing, roof, wall, combination, animated, flashing, moving or rotating); the valuation of the sign; a certificate that the applicant will not erect the sign in violation of the Workman's Compensation Laws of California; a certificate that the applicant has the *written* permission of the owner or tenant on whose property the sign is to be erected; a statement describing the fire zone, lot frontage, area of existing signs on the lot, the area of the proposed sign, the size of the sign, the distance between the bottom of the sign and the ground, the maximum projection of the sign beyond the face of the building or street property line, and the distance between the top of the sign and any overhead electrical wires. The permit application also requires that it be accompanied by a plot plan showing the position of the sign and its relation to structures and other signs on the property; plans and specifications for the sign and the method of attachment or anchorage; stress sheets and calculations prepared by a licensed civil or structural engineer; such other information to show full compliance with all applicable laws "when required," and proof of a permit from the Division of Highways with regard to any signs projecting over the State right-of-way. The permit application also instructs the applicant that the building department must be notified for inspection 24 hours prior to the erection of the sign.

This application form is used for all signs, ranging from cardboard posters to permanent freeway billboards. Other provisions of the Redwood City Code actually exempt the applicant for a temporary sign advertising such events as "elections . . . and circus performances . . ." (Redwood City Code, Section 3.133) from furnishing much of the information requested in the application form. The application itself, however, does not instruct which portions must be completed and on the contrary expressly warns that "Only Complete Application Accepted." See Appendix B, page 23. Defendant Gyselbrecht, the city building inspector responsible for enforcement of the sign ordinance, testified he generally assists persons who fill out the application in his office, but admitted that some applicants are required to provide greater information than others (no explanation for the favorable treatment was given) and that persons who secure the permit application by mail are not informed that the "Only Complete Application Accepted" instruction does not mean what it says.

Uncontradicted evidence before the trial court showed that the permit procedure was so difficult, complicated, expensive and restrictive as to virtually prohibit the use of political signs by supporters of candidates running for local office. Appendix B, p. 12, n. 14. The irony of the matter is that as convoluted as the permit system is, it lacks the essential element necessary to achieve the purported goal. Of the vast data collected, *none* of it connects a particular sign with its owner, as the application form does not require the applicant to describe or provide a facsimile of the sign he wishes to post. There is no pro-

vision that the sign itself must bear identification of its owner.

Section 3.137(b) provides that the aggregate area of all temporary signs placed or maintained within the City advocating a particular candidate or ballot issue shall not exceed 64 square feet. Subpart (a) of that section allows signs up to 16 square feet; thus only *four* such signs are allowed for any one candidate or issue *throughout the entire city,* which is populated by 55,000 people and extends over an area exceeding 20 square miles. Appendix B, p. 19.

Section 3.139 bans, absolutely, any political sign of any type, size or quality in residentially zoned districts.

Section 3.89 provides, *inter alia,* that ". . . the building inspector many summarily, without notice, remove any temporary sign which is erected, placed or maintained in violation of this article in any zoning district."

Under these regulations, an individual wishing to erect a single 50¢ poster is required to pay a $1.00 fee, post a $5.00 bond and provide the above-detailed information to obtain a permit. He would not be permitted to post the sign on his own front yard. On a larger scale, a campaign committee wishing to erect 100 identical 4′ x 4′ political posters (assuming it were not bound by the four-sign-per-candidate requirement) would have to pay a $100.00 non-refundable "inspection fee," post $500.00 in the form of a cash deposit or a surety bond and fill out 100 separate permit applications.

b. Provisions of the Code Not Challenged by Plaintiffs

It is perhaps as important to set forth what is not at issue in this cause as to state what is. The following provisions of the Code are not challenged:

Section 3.135 prescribes that temporary political signs are not to be maintained for a period in excess of 45 days and must be dismantled within 10 days after the election.

Section 3.86, provides that "no sign . . . shall be . . . erected so as to obstruct or prevent free ingress or egress from any window, door or fire escape."

Section 3.87 states that "no sign shall be erected so as to obstruct the vision of vehicular traffic or at any location where it may interfere with, or be confused with, any traffic signal or device."

Section 3.89, provides that "the building inspector may cause any sign which is an immediate peril to persons or property to be removed summarily and without notice."

REASONS THE WRIT SHOULD BE DENIED

The decision of the Ninth Circuit does not conflict with the decision of another court of appeals on the same or similar matter; it involves no important state or territorial question; it does not present any other ground for review by way of certiorari as set forth in Rule 19(b) of the Rules of the Supreme Court. While the issues of law involved in this case are important, they are not novel. The ruling itself merely resolves the dispute between the concerned parties over specific and peculiar code provisions which could be amended at the next town

meeting. There is nothing on record to show a pattern of similar laws in other cities. No other California municipality regarded this case with sufficient interest to file an amicus curiae brief in the proceedings below. The fact that no federal court outside the Ninth Circuit has concerned itself in a reported decision with a similar case suggests that the issues presented are not of wide-spread concern or likely to be raised in future litigation. These circumstances lead to the conclusion that the petition does not present an issue of sufficient scope and national relevance to justify consideration by this Court.

The Ninth Circuit simply corrected a gross misapplication of law by the District Court, which had accepted defendants' argument, resurrected here, that the First Amendment issues raised in the complaint were to be assessed under legal standards suitable to municipal zoning disputes, in which the plaintiff has the burden of showing the regulations constitute an unreasonable use of police powers. Appendix B, p. 10. In outlining the proper judicial test, the court drew carefully from relevant Supreme Court opinions holding that where a statute on its face inhibits free expression it can be maintained only for weighty or compelling reasons (*Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972), Appendix B, pp. 11-12), particularly in the electoral arena (*Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971) (Appendix B, p. 11)); *Buckley v. Valeo,* 96 S.Ct. 612 (1976) (Appendix B, pp. 11, 13, 16), and must be drafted in the narrowest manner consistent with a legitimate end (*Hynes v. Mayor of Oradell,* 48 L.Ed.2d 243 (1976) (Appendix B, p. 14)). Adjudged by these stricter standards, the constitutional defects of the Code are apparent.

The Court of Appeals' judgment is consistent with applicable Supreme Court decisions. The essential questions raised in the petition were answered almost forty years ago in *Schneider v. State,* 308 U.S. 147 (1939). The dispute there arose from a municipal ordinance prohibiting the distribution of political handbills. The court rejected the city's argument that its interest in keeping its neighborhoods free of rubbish was paramount to defendant's right to free expression, holding that "The public convenience and convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Schneider v. State,* 308 U.S. at pp. 162-163. See, also, Appendix B, p. 13.

In view of the clear applicability of *Schneider* and related cases (e.g., *Hynes v. Mayor of Oradell,* 48 L.Ed.2d 243 (1976) and cases cited at pp. 250-252; *Monitor Patriot v. Roy,* supra; *Ross v. Goshi,* 351 F.Supp. 949 (D. Ha. 1971); *Pace v. Village of Walton Hills,* 15 Ohio St.2d 51, 238 N.E.2d 543 (1968)), the court rejected the obviously strained analogy to the following cases cited by petitioners. In *Kovacs v. Cooper,* 336 U.S. 77 (1949), the Court held that a city is entitled to divert sound trucks form residential neighborhoods because their loud message is literally inescapable and constitutes an invasion of privacy. Political signs do not have the same offensive qualities. Appendix B, p. 15. *Village of Belle Terre v. Borass,* 415 U.S. 987 (1974) is inapposite for the reason that it involved no First Amendment question. In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), the Court

held that the commercial advertising space in municipal street cars, unlike open space and street corners, was not a First Amendment forum; the Court therefore did not engage in a First Amendment analysis in denying the relief sought by plaintiff. *Pell v. Procunier,* 417 U.S. 817 (1974) held that in light of a then recent attempted jail break the State was justified in limiting access between prisoners and media representatives in its prisons. Unless we are to accept that conditions prevailing in Redwood City resemble those in San Quentin, *Pell v. Procunier* is of little assistance. The Court of Appeals was also correct in dismissing petitioners' argument that *Young v. American Mini Theatres, Inc.,* 96 S.Ct. 2400 (1976) signals the departure from *Schneider v. State,* supra, observing that *Young* ". . . goes no further than to assert that '*commercial* exploitation of material protected by the First Amendment is subject to zoning or other licensing requirements'. Id. at p. 2448 (emphasis added)." Appendix B, p. 28, n. 38.

By ruling these particular code sections unconstitutional the Court of Appeals did nothing to deprive the city of its right to reasonably regulate the use of political signs. The Court expressly recognized that many of the interests advanced by the city in defense of the regulations were legitimate (Appendix B, pp. 12-13), but that the provisions in question were simply " 'unnecessarily restrictive for the purpose they were designed to serve.' [Citations omitted]." Appendix B, p. 14. The Court of Appeals had neither the duty nor the jurisdiction to re-draft Redwood City's ordinance to cure its constitutional maladies. *Hynes v. Mayor of Oradell,* supra, 48 L.Ed.2d at p. 254. Neverthe-

less, the court set forth clearly the guidelines for permissible regulation. A provision limiting the number of signs on a particular residential lot may be constitutionally permissible, the absolute ban of all signs is not. Appendix B, pp. 27-28; *Pace v. Village of Walton Hills,* supra; cf. *Ross v. Goshi,* supra. A single permit issued to a campaign committee for the posting of signs may be acceptable; a complicated, burdensome and ineffective permit system is not. Appendix B, pp. 25-26. A municipality is entitled to collect fees and deposits in special circumstances, but an arbitrarily fixed fee and security requirement for all signs, regardless of size or construction, is unacceptable. Appendix B, p. 2; *Cox v. New Hampshire,* 312 U.S. 569 (1941). The city may summarily remove signs which are abandoned or hazardous, but may not remove signs without notice simply because they are considered a nuisance or are believed to be in violation of a code provision. Appendix B, p. 29; *Freedman v. Maryland,* 380 U.S. 51 (1965); *Police Department v. Mosley,* 408 U.S. 92 (1972).

Defendants picture the suburban dweller as one whose finely developed sense of aesthetics precludes an interest in actively expressing political preferences—or in learning those of his neighbors. Plaintiffs, by bringing this action, belie this unflattering portrait. Their right to post signs for a few weeks during an election, *and their neighbors' right to see them* are secured by the Constitution. *Schneider v. State,* supra; *Red Lion Broadcasting Co. v. FCC,* 375 U.S. 367 (1969).

Petitioners' quarrel with the Court's characterization of political signs as "virtually free speech" results from

their misunderstanding of the concept. "Speech," in this context, is taken to mean the use of universally recognized symbols to convey ideas; it is distinguished from *conduct.* Cf. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). The political poster is pure expression, whether it is held by an individual or posted on his property; it no more loses constitutional protection when it is released from the owner's grasp than does a newspaper when it is placed on a newsstand.[1] *Ross v. Goshi,* supra, 351 F.Supp. 949.

The argument that plaintiffs should forfeit the right to post political signs because alternative means of communication are available requires little comment. The campaign poster is a traditional, effective and economical political medium having unique advantages over others. Appendix B, p. 16. The fact that other means of communication are available is insufficient to deny plaintiffs' right to use this traditional one. *Quaker Action Group v. Morton,* 516 F.2d 717, 733, n. 49(a) (D.C. Cir. 1975).

In summary, the judgment of the Ninth Circuit is well reasoned, fair and in harmony with long standing First Amendment principles. The Petition presents no substantial reason for review of the judgment by the Supreme Court.

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[1]The Court of Appeals expressly ruled that at the time the sign is actually *abandoned* its First Amendment protection is "minimal at most." Appendix B, p. 32.

CONCLUSION

For the reasons stated above, Respondents pray the Petition for Writ of Certiorari be denied.

Dated, San Francisco, California,
November 4, 1976.

Respectfully submitted,
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Attorney for Respondents.